

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of	:	CG Docket No. 02-278
	:	
Vincent Lucas's June 18, 2014 Petition for a	:	DA 14-976
Declaratory Ruling Regarding the Liability of	:	
Entities that Knowingly Provide Substantial	:	
Assistance to Telemarketers While Knowing that	:	
the Telemarketers Are Engaged in Practices that	:	
Violate the Telephone Consumer Protection Act	:	
	:	
Rules and Regulations Implementing the	:	
Telephone Consumer Protection Act of 1991	:	
	:	

**EX PARTE COMMUNICATION: SUMMARY OF SUBSEQUENT LEGAL
DEVELOPMENTS**

This document summarizes legal developments that have occurred in the nearly six years since I filed my Petition for Expedited Declaratory Ruling¹. The U.S. District Court for the Southern District of Ohio has directed this Commission to provide an “estimate, to the best of the FCC’s knowledge and ability, concerning the date of any anticipated ruling on the Petition” on or before May 1, 2020. Exhibit.

A. This Commission has made subsequent rulings that substantially adopt my position

Although this Commission has not yet made a ruling on my Petition, this Commission has made rulings that substantially adopt the Petition’s thesis that service providers should be liable under the TCPA when they willfully aid telemarketers in violating the TCPA.

¹ This Commission sought comments from the public on the Petition, and the public comment period expired on August 25, 2014. [<https://docs.fcc.gov/public/attachments/DA-14-976A1.pdf>]

FCC-15-72² is the first FCC Declaratory Ruling addressing the circumstances under which the provider of services which assist telemarketers may be held liable. The TCPA imposes liability on persons who “initiate” the telephone calls. *E.g.* 47 C.F.R. § 64.1200(a)(3) & (c). FCC-15-72 interprets the meaning of “initiate.” Paragraph 30 says that “initiating” a call

can include being “so involved in the placing of a specific telephone call” as to be deemed to have initiated it. Thus, we look to the totality of the facts and circumstances surrounding the placing of a particular call to determine: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA. In discussing below how these standards apply in the context of factual circumstances presented in petitions before us, we identify factors that are relevant to the DISH Declaratory Ruling analysis. Depending upon the facts of each situation, these and other factors, such as the extent to which a person willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either functionality to clients, can be relevant in determining liability for TCPA violations. Similarly, whether a person who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes may also be a factor in determining whether the platform provider is so involved in placing the calls as to be deemed to have initiated them.

(footnotes omitted, emphasis added).

For example, if the Commission staff notifies a platform provider that its service is being used unlawfully by its clients and the platform provider then allows such usage to continue after this warning, we will consider the fact that the platform provider allowed such usage to continue after having actual notice of the unlawful activity to be a possible indicator that the platform provider is actively participating in the making or initiating of the calls at issue.

Id. ¶ 30 n.110.

These passages clearly set forth a basis for TCPA liability for any platform service provider who “knowingly allowed its clients(s) to use that platform for unlawful purposes.” “Willfully

² <https://docs.fcc.gov/public/attachments/FCC-15-72A1.pdf>

enabling fraudulent spoofing” or “assist[ing] telemarketers in blocking Caller ID” are examples of “platform services” for which a service provider may be held liable.

This Commission’s 2017 Dialing Services LLC forfeiture action³ confirms that platform service providers are liable under the TCPA if they willfully provide substantial assistance or support to telemarketers who violate the TCPA. The statement of Chairman Pai supporting the action, FCC 17-97 at 17, makes this clear⁴. Chairman Pai notes that Dialing Services “may not have physically placed the calls itself.” Nevertheless, Dialing Services LLC is liable because the company provides

a spoofing functionality designed to provide deceptive information about a call’s originating point or to hide that information altogether. But even more significant, the Company directly assists its clients in crafting and structuring their messages to help them conceal their true intentions, all for one purpose: to maximize the effectiveness of the illegal robocall campaigns that Dialing Services helps facilitate.

Id. (emphasis added). By using the “crafting and structuring” of telemarketing messages as a ground for imposing TCPA liability, this Commission has adopted the position of the FTC and me that a service provider is liable when it “provide[s] substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice” that violates the TCPA. *Cf.* FTC Telemarketing Sales Rule at 16 C.F.R. § 310.3(b).

³ <https://docs.fcc.gov/public/attachments/FCC-17-97A1.pdf>

⁴ This is also confirmed by Commissioner O’Rielly’s dissenting statement, FCC 17-97 at 18.

B. Several federal courts have interpreted this Commission’s 2015 and 2017 rulings as imposing liability as advocated in my Petition

Spiegel v. EngageTel, No. 1:15-cv-01809 (N.D. Ill. Sept. 29, 2016)⁵ interpreted FCC-15-72 to hold that EngageTel, who (allegedly) provided the following platform services, may be liable under the TCPA: caller ID name falsification, caller ID “number spoofing”⁶, and paying telemarketers part of the CNAM access fee revenue. On March 28, 2019, that court denied EngageTel’s motion for summary judgment, based on the 2015 FCC ruling. *Spiegel v. EngageTel*, 372 F.Supp.3d 672 (N.D. Ill. 2019).

In *Cunningham v. Montes*, 378 F.Supp.3d 741 (W.D. Wisc. 2019), the court denied Montes’ motion for summary judgment, citing the 2015 FCC ruling.⁷ The court cited FCC-15-72 ¶ 30 to find that the court must look to the “totality of the facts and circumstances surrounding the placing of a particular call” including “The extent to which the defendant ‘willfully enables fraudulent spoofing of telephone numbers’”, “The extent to which the defendant ‘assists telemarketers in blocking Caller ID’”, and “Whether a defendant ‘who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes’”. *Id.* at 747-748.

The "totality of the circumstances" approach set out in the 2015 FCC Order will not provide easy answers in close cases. But it makes one thing clear: a provider of [platform] services cannot blithely sit back and blame his customers for any TCPA violations that result from their use of his service. At a higher level of abstraction, two principles emerge from the 2015 FCC Order: TCPA liability attaches to those who control or are deeply involved in making specific calls, and to those who knowingly allow a [a platform service] system to be used to make prohibited robocalls.

⁵ https://scholar.google.com/scholar_case?case=11943389373109735322

⁶ I.e. displaying a number on a caller ID device different than the number from which the call originates

⁷ An auto-dialer was at issue.

Id. One substantial factor relied on by the court in denying summary judgment is “evidence that Montes knowingly allowed his clients to use his website to make prohibited robocalls. Evidence that Montes had been warned that his website was ‘being used unlawfully by its clients’ but nonetheless ‘allow[ed] such usage to continue after this warning’ would be ‘a possible indicator that [he was] actively participating in the making or initiating of the calls at issue.’” *Id.* at 749 (quoting FCC-15-72 ¶ 30 n.110).

In *Lucas v. Telemarketer Calling from (407) 476-5680 & Other Tel. Nos.*, No. 18-3633 (6th Cir. Nov. 1, 2019), the Sixth Circuit vacated the dismissal of the case and ordered the district court to reconsider its decision in light of this Commission’s 2015 and 2017 rulings, and ordered the district court to inquire as to the status of my Petition.

C. A ruling on my Petition is of substantial public importance

As this Commission is well aware, Americans are bombarded with unlawful, fraudulent calls on a regular basis --- frequent phone calls from the fake IRS demanding payment of allegedly delinquent taxes, frequent phone calls from fake Microsoft offering to fix non-existent computer viruses, frequent phone calls offering to lower credit card interest rates, etc. These calls almost always come from call centers outside the U.S. Tax-related phone scams have cost victims more than \$72 million dollars.⁸ Just one India-based call center scam defrauded thousands of U.S.

⁸ IRS alert [<https://www.irs.gov/newsroom/irs-be-vigilant-against-phone-scams-annual-dirty-dozen-list-continues>]

residents of “hundreds of millions of dollars.”⁹ People suffering from Alzheimer’s disease and the financially inexperienced, uneducated, or desperate are particularly vulnerable.

The dirty secret is that these foreign scammers are often willfully assisted by U.S. companies. Telephone Management Corporation, et al. (“the TMC group”) assisted foreign telemarketers in violating the TCPA by providing telephone numbers for the foreign telemarketers to use, providing “number spoofing” services, and paying the foreign telemarketers each time that they used the TMC group’s phone numbers. The TMC Group’s payments to foreign telemarketers encouraged the telemarketers to make an increased number of illegal telemarketing calls because they get paid for making the calls regardless of whether the consumer responds to the call. The TMC Group knew that the foreign telemarketers were violating the TCPA and nevertheless continued to encourage them to make illegal phone calls and continued to financially reward them for doing so. The TMC Group also assisted the foreign telemarketers by attempting to hide the identities of the foreign telemarketers. The TMC Group set up International Telephone Corporation (“ITC”), incorporated in Belize, but secretly owned by the TMC Group, and then told civil and law enforcement investigators that the TMC Group’s phone numbers were assigned to ITC and that the investigators would need to get the records from ITC to find the identities of the end-users of the phone numbers. Thus, it would appear that the records are beyond the subpoena power of U.S. courts. The TMC Group should be liable under the TCPA.

⁹ DoJ press release [<https://www.justice.gov/opa/pr/24-defendants-sentenced-multimillion-dollar-india-based-call-center-scam-targeting-us-victims>]

Conclusion

This Commission should provide the U.S. District Court for the Southern District of Ohio with an estimate of when the Commission will make a decision on my Petition, and the Commission should grant my Petition.

Respectfully submitted,

VINCENT LUCAS
Petitioner